



UK Environmental Law Association (UKELA) response to Defra's and the Welsh Government's:

- **Part I: Waste crime: consultation on proposals to enhance enforcement powers at regulated facilities; and**
- **Part II: Call for evidence on other measures to tackle waste crime and entrenched poor performance in the waste management industry.**

https://consult.defra.gov.uk/waste/enhanced_powers_to_tackle_waste_crime .

Response by the UKELA Waste Working Party and Wales Working Party

The UK Environmental Law Association (UKELA) aims to make the law work for a better environment and to improve understanding and awareness of environmental law. UKELA's members are involved in the practice, study or formulation of environmental law in the UK and the European Union. It attracts both lawyers and non-lawyers and has a broad membership from the private and public sectors.

UKELA prepares advice on proposals of governments and regulators covering a range of environmental law topics, with the help of its specialist working parties. This response has been prepared with the help of the UKELA Waste Working Party and UKELA Wales Working Party.

CONSULTATION QUESTIONS

Question 1: Do you agree with the proposals, A to F? Please provide any additional comments to support your answer against each proposal and, if possible outline any additional measures needed to underpin them?

Response: Please see our various comments below in relation to the specific issues. More draconian legislation is not a substitute for proper funding of the

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Environment Agency (EA) or Natural Resources Wales (NRW) in their enforcement roles. UKELA feels that the Government should consider a greater focus on the responsibility of waste producers, rather than simply focussing on waste managers. The waste duty of care was intended to address this issue. However, it is not fully utilised to ensure compliance because nobody has obligations to enforce it. Many waste problems can originate from a failure by waste producers to meet the duty of care practice by waste producers and more stringent enforcement would be more effective than many other measures.

Question 2: Do you have any views on whether there are unforeseen costs or benefits to legitimate operators, the regulators or any other organisation that may result from any of the proposals A-F?

Response: UKELA's main concern with the consultation's enforcement proposals is their potential to be used in a draconian manner. This could impact disproportionately on legitimate SMEs in the waste management sector which may be in a genuine dispute with the regulator. It is possible that disproportionate or incorrect enforcement could even lead to a legitimate business being forced to close down before such a dispute is resolved. It is vital, therefore, that any proposals that are taken forward require a reasonable and measured approach.

The supporting guidance should be drafted in a way to give the industry confidence that the application of any additional powers will be proportionate and take account of the particular circumstances of the company in question.

Proposal A - Suspending permits where an operator has failed to meet the conditions of an enforcement notice.

Response: In the light of our clients' experiences, we are concerned at this proposal for the following reasons:

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- This marks a significant step change in the regulators' powers.
- Enforcement notices can be issued incorrectly, inappropriately or even where they should not be used at all.
- There is a real risk of it leading to more time-consuming and expensive litigation for both parties.

A fast-track appeal against suspension of the Environmental Permit to the First Tier Tribunal would be a sensible safeguard for legitimate operators in the SME sector that could be disproportionately affected.

Due to many waste businesses being dependent on a constant turnover of wastes, a suspension of their Permit can quickly lead to failure of a legitimate business. This proposal should also be viewed in the light of the currently inadequate appeal process for Notices. Commencing an appeal does not suspend an Enforcement Notice or a Suspension Notice. Therefore, a recipient has to comply in any event. There is limited recourse against a defective Notice. If an appeal is filed, there is no obligation on the EA/NRW to proceed with an appeal if it appears it will lose: the EA/NRW simply withdraw the Notice with no costs sanction unless the appeal hearing has taken place. As a result, the appellant can often incur considerable costs, but with no costs recovery or recourse.

Judicial review may be the only remedy where no statutory appeal process exists and in any event is disproportionately expensive for SMEs.

If a new range of enforcement powers are to be given to the EA/NRW, there must be some means for operators to legitimately challenge any abuse of such powers

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other than by Judicial Review. The alternative is for the EA/NRW to be liable for losses incurred by the Appellant where the First Tier Tribunal determines that they have exercised their powers incorrectly.

Proposal B - Enable the regulators to issue notices that include steps an operator must take to prevent the breach of a permit getting worse - for example, in the waste industry, key actions to stop more waste coming onto poorly managed sites.

Response: We agree with the proposed clarifying amendment, but are of the view that it is important that it is subject to clarifying guidance explaining how it can be used, which should be issued at the same time.

Proposal C - Enable the regulators to take physical steps to prevent an operator from committing further breaches of the permit.

Response: We agree with the proposal.

Proposal D – Enable the regulators to take steps to remove a risk of serious pollution, whether or not a facility is under a permit.

Response: We agree with the proposal, which is effectively addressing a lacuna in the law.

Proposal E - Enforcement by the High Court.

Response: We agree with the proposal.

Proposal F - Power to serve a notice to remove waste.

Response: We agree with the proposal.

Part II: Call for evidence on other measures to tackle waste crime and entrenched poor performance in the waste management industry.

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12. Fixed penalty notices for fly-tipping

Q.1 Would the introduction of fixed penalty notices for the offence of fly-tipping help tackle the problem?

Response: Introduction of fixed penalty notices may have some deterrent effect. However, by the very nature of fly-tipping, there will be significant difficulties in identifying offenders and enforcing notices.

Q.2 What are the advantages of the use of fixed penalty notices for fly-tipping?

Q.3 What are the disadvantages of the use of fixed penalty notices for fly-tipping?

Response: See answer to Q.1 above.

Q.4 If a proposal was made to introduce fixed penalty notices for fly-tipping, how much should the fixed penalty be set at to act as a sufficient deterrent?

In setting fixed penalties it is important to set them at a rate that is proportionate to the offence, but sufficiently high to deter the practice or a repeat of such an act.

13. Actions to improve landowner awareness of potential liabilities for waste

Q.6 Please provide evidence including examples of the extent to which waste is being abandoned and landowners are being left to tackle waste or pollution caused by current or former tenants.

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Response: See answer to Q.9 below.

Q.7 Do you have any proposals on the best way to educate and increase awareness amongst landowners of their potential liabilities?

Q.8 What more can be done through the lease arrangements with tenants to prevent or mitigate the potential liability of landowners?

Q.9 Would you like to see operators provide evidence to the regulators of their landowner's awareness and consent to the proposed waste activity as part of the permit application process?

Response: Yes. Key waste management forms could also be sent to the landlord, provided they were accompanied by an explanatory note. The permit application procedure could include a requirement that the application and CAR forms are served on the landlord or landowner. However, this would not assist with wholly illegal waste operations where the only solutions are regular checking of a tenant's activities by the landlord's property manager and for the EA/NRW to inform a landlord immediately if they become aware of such activities.

There is a clear trend and a number of well-documented cases of landlords being left with a significant clean up liability for a tenant's unlawful waste operation. We can provide details if required, but these cases will be well known to the EA.

Q.10 Do you have any views on the ability of liquidators to disclaim environmental permits as 'onerous property' in England and Wales?

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Response: In general the right to disclaim a Permit is in line with the approach to other “onerous property” in liquidation cases. If the Permit is valuable, then a liquidator will aim to effect its transfer to another party to achieve that value, and in such a case a transfer is much quicker than a new operator starting from scratch. If it has no value then the existence of the Permit could be a barrier to the future beneficial use of a property. If a liquidator has no assets in the liquidation, but is not allowed to disclaim the Permit, this could simply sterilise a site or leave a landlord to comply with the Permit.

14. Operator competence

Q.11 What are your views on amending legislation to formally require operators of regulated waste management facilities to be competent in respect of: (a) technical competence (b) financial provision and (c) operator performance?

Response: Overall, the waste industry should determine what is reasonably achievable to ensure that it is not a disproportionate barrier to SMEs, particularly in relation to financial provision.

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Response: Overall, the waste industry should determine what is reasonably achievable to ensure that it is not a disproportionate barrier to SMEs, particularly in relation to financial provision.

Q.12 If a proposal were put forward to enshrine the components of the test in legislation, should the legislation apply to just waste management activities or some or all other types of regulated facility?

Q.13 Would it be appropriate for operator competence to be re-assessed if a company changed its directors, company secretary or similar managers?

Q.14 If proposals to assess operator competence on a change to directors etc were put forward, would it be appropriate to apply that requirement to all companies?

Q.15 If an operator competence test were to be enshrined in legislation, in what way might that be done? Examples might include the inclusion of an operator competence requirement in permit conditions, the creation of a specific new offence for failure to maintain operator competence or the extension of existing suspension and revocation powers to breach of the operator competence test.

Q.16 What are the arguments for applying technical competence to all types of permitted waste management facility, through one of the two currently approved schemes?

Response: Technical competence in all types of permitted waste management facilities is essential in order to ensure:

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- Increased awareness of environmental risk and control.
- Corporate management of environmental risk.
- Reduced risk of pollution.
- Reduced risk of infringement of permit conditions.

However, we question whether the current two schemes are robust enough to satisfy each of these requirements. UKELA is of the view that between WAMITAB and CMS, there is sufficient provision for ensuring technical competence among permitted operators. It is also noted that the conditions of an environmental permit already lay down the requirement for appropriate technical competence. However, there is evidence of wide-scale non-compliance with this requirement, which could be more related to poor enforcement, rather than a lack of regulatory requirement. UKELA believes that a fair proportion of non-compliance is due to operators' ignorance of statutory requirements and the challenge that operators have in understanding their obligations. Improved information available through GOV.UK could help in this respect.

UKELA would suggest that the CMS is more likely to achieve the main aims of operator competence as the single person WAMITAB qualification is individually focused and does not guarantee wider site management benefits.

Q.17 What are the arguments against applying technical competence to all types of permitted waste management facility, through one of the two currently approved schemes?

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Response: It is important to be clear about what needs to be achieved before deciding whether or not one or other of the approved schemes are appropriate for achieving the overall objective of assurance on relation to technical competence. There are some doubts as to the effectiveness of the WAMITAB system in meeting the underlying expectations of technical competence. There is a strong argument for technical competence standards being formally applied through the Environmental Permitting Regulations. However, UKELA suggests that a full assessment should be carried out of the extent to which each scheme achieves the key requirements together with an appraisal of what constitutes an appropriate and proportionate level of competence.

UKELA also has concerns as to whether a COTC holder on a site has sufficient 'control' over the site to effectively manage financial and operational issues. This is further commented on in the response to Q20 below.

Q.18 If this were proposed, would it pose a difficulty for any particular part of the waste industry?

Response: Yes. In UKELA's view, a large proportion of permitted sites that either do not have current cover or have single person cover without any arrangements for substitution if that individual is absent would face challenges in ensuring technical competence coverage. If CMS or WAMITAB is applied rigorously and consistently, this could give rise to significant costs for the waste industry, which could be disproportionate to the risk posed by the activity. This is particularly the case for single site activities such as the beneficial use of waste or agricultural deployments.

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Furthermore, the current system of demonstrating permit compliance is too expensive for a sole operator, for example those operating under an SR2010#4 land-spreading permit. WAMITAB can be a large financial burden for such operators.

The current system requires large amounts of evidence gathering that can often be more of a test of literacy than operator competence. This reinforces the need to review the existing systems in relation to input and output.

UKELA would also support some form of competence test in relation to exemptions as there appears to be a significant gap in ensuring operator competence for the higher risk activities satisfied by exemptions. However, as stated above, we consider that this does not justify a WAMITAB or CMS in their current forms.

Q.19 Please provide views on the ways in which the regulators are made certain of the name(s) of the technically competent manager(s) at permitted sites.

Response: This should already be happening through the requirement for a register on site showing the competence cover at any point in time. We are aware that there are some companies providing COTC for multiple sites where the cover is purely notional and this will continue until the EA/NRW officers apply more rigorous enforcement. This would not apply for CMS.

Q.20 Please provide views on how those providing technically competent management at a site should be held to account for the standards of performance.

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Response: UKELA considers that site accountability is a significant weakness of the WAMITAB system. CMS applies corporate responsibility for performance standards, but the WAMITAB COTC holder generally has no formal control and therefore should not be held legally liable. Unless the COTC holder is a director, we suggest that the directors and for sole traders, the permit holders, are held legally liable for their COTC holder's performance.

Q.21 Please provide views on the amount of time those responsible for managing the site should be present and what factors should determine that period.

Financial provision

Q.22 Should financial provision for some or all permitted waste operations be reintroduced on a site-specific basis linked to the type of activity and the type of wastes received?

Q.23 If so, should the amount of the financial provision be linked not only to returning the land to a satisfactory state to meet permit surrender requirements but also to foreseeable clear-up costs resulting from a breach of a permit or after an environmental accident?

Q.24 For landfill sites, should the scope of financial provision be extended to cover operational costs that are incurred during the period when waste is accepted for disposal and/or after waste disposal has ceased?

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Q.25 What is the best mechanism or combination of mechanisms for waste operators to make and maintain financial provision for their sites so that they are secure and available to fulfil permit obligations and deal with the consequences of breaches of the permit or environmental accidents?

Q.26 If required to make financial provision, what would be the likely costs of making financial provision and the impact on waste operators of different sizes?

Response: The question of financial provision has been discussed at great length over many years. Due to financial constraints, many SMEs would find it difficult to obtain many of the mechanisms suggested, while large operators will be able to comply. If the Government is keen to retain SME operators in the waste industry, one option could be the payment of a small initial lump sum with an annual increment from profits to increase that sum to an agreed level on the basis that it could be accessed by the operator for specific types of site improvement to reduce the potential physical shortcomings of a site. This could be combined with other mechanisms to deal with abandoned waste on sites. Financial options are principally a matter for the waste industry to decide upon, while having regard to the position of smaller operators.

Operator performance

Q.27 If you support amending legislation to require operators of waste management facilities to demonstrate operator competence, are changes needed to the particular aspects of past performance, including spent

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convictions, that should be taken into consideration in determining an application for a permit?

Management systems

Q.28 Should the requirement for operators' site management plans be embodied in legislation or are they and their content best left to the regulators to determine?

Response: General principles should be established to which the regulator and Operator have to adhere. However, details should be left for negotiation in relation to particular cases in order to give flexibility to both parties. Any changes to the current system need to be discussed with the industry, but it should be noted that there are concerns about regulatory bodies requiring operators to comply with too many systems and increasing the burden on waste management operators.

15. Options to address abandoned or orphaned waste management sites

Q.29 Does the Government need to make a scheme to cover the full costs of clearing and remediating abandoned or orphaned sites mandatory so that they do not rely on the public purse or would a voluntary approach work?

Q.30 Should joining such a scheme be an alternative to, or additional to site-specific financial provision?

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Q.31 If you think such a scheme is desirable, please provide your views on how it should be funded and administered, including how decisions on the need to draw from it would be made?

Q.32 Do you have any evidence or views on what level of funding would be required for such a scheme so as to be proportionate to the risk?

Q.33 Do you have any evidence or views of the costs and impacts incurred by the public sector, businesses or landowners in cleaning up and remediating land or premises which have been used for waste management operations and then abandoned?

Reponse: This is a matter for the waste industry as a whole. If further consideration is to be given to this proposal, UKELA would be prepared to provide more detailed input if thought helpful.

16. Powers to recharge for pollution works

Q.34 Do you have evidence of pollution caused by the deposit of waste on land by waste operations or abandoned waste that might merit powers to remediate?

Q.35 What are your views on widening the scope of the regulators powers to recover the costs of investigations and remedial works undertaken to prevent or remedy pollution caused by the deposit of waste on land?

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Response: In principle, we are in favour provided the charges are reasonable and that the costs are based only on the necessary remedial works (not investigatory costs).

17. Exemptions from environmental permitting

Q.36 Do you have any evidence of the extent of waste crime and poor performance from those operating under registered exemptions from environmental permitting?

Q.37 Is there a need to tighten up the process for the registration of exempt waste operations? If so, what steps would you wish to see introduced into the registration process?

Response: Yes, (low) fees could be introduced to allow the regulator to undertake basic checks. Risk-based codes could be introduced.

Q.38 Would you wish to limit the scope of the activities that are exempt from the need for an environmental permit? If so, which exemptions would you want to see further restricted and why?

Response: On the contrary, there is a case for more, rather than fewer exemptions to cover a range of low risk waste activities, but with the focus on ensuring the duty of care is properly enforced on the waste producer (who has a duty to ensure waste is being handled correctly).

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